STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY A. TRUCKOR and ALCATRAZ INDUSTRIES, INC.,

Plaintiffs-Appellants,

v

ERIE TOWNSHIP, DENISE GORDY, PAUL RICHARDSON, GARY LOWRY, WILLIAM JACOBS, LARRY GUINN, JEFF BENORE, DENNIS STARK, PAUL MIKELS, DAN BONKOSKI, CINDY BAUM, GAYLE BURLEN, DIANE LAPLANTE, AMY WHIPPLE, TAD COUSINO and W. THOMAS GRAHAM,

Defendants-Appellees.

FOR PUBLICATION
March 31, 2009

No. 279475
Monroe Circuit Court
LC No. 05-020863-CH

Advance Sheets Version

Before: Gleicher, P.J., and K. F. Kelly and Murray, JJ.

GLEICHER, P.J. (*dissenting*).

I respectfully dissent. Because the challenged zoning ordinance fails to provide adult businesses with adequate alternative avenues of expression, it violates the First Amendment.

Zoning ordinances aimed at ameliorating "the undesirable secondary effects" of adult entertainment businesses, rather than regulating the content of their expression, do not offend the First Amendment. *City of Renton v Playtime Theatres, Inc*, 475 US 41, 49; 106 S Ct 925; 89 L Ed 2d 29 (1986). In *Renton*, the United States Supreme Court explained that content-neutral zoning regulations pass constitutional muster "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id*. at 47. But zoning authorities may not use "'the power to zone as a pretext for suppressing expression'" and must "refrain from effectively denying" adult businesses "a reasonable opportunity" to operate. *Id*. at 54 (citation omitted).

Plaintiff Alcatraz Industries, Inc., a corporation owned by plaintiff Jeffrey A. Truckor, operates an adult entertainment business on Telegraph Road in defendant Erie Township. After plaintiffs opened their Telegraph Road business, the township enacted a zoning ordinance addressing the secondary effects of adult entertainment establishments. Erie Township's

ordinance limited future adult entertainment locations to property zoned C-2 and imposed a 1,200-foot separation requirement between adult businesses and residential areas. In 2005, Truckor purchased land on Victory Road, within Erie Township's C-2 zoning district, because he sought to move the adult business to this new location. As the majority acknowledges, Erie Township officials advised Truckor that because of the ordinance's footage requirements, "there is no current possibility for a new establishment to locate within the C-2 district." *Ante* at 3. Thus, the township's zoning ordinance effectively denies any adult business the opportunity to locate within Erie Township and prevents plaintiffs from relocating their current adult establishment. Nevertheless, the majority deems the challenged ordinance constitutionally valid, concluding that "[i]t is simply impossible to show that the government (the township) has unlawfully suppressed plaintiffs' speech while the business still operates within the township borders." *Ante* at 8.

However, in my view, the central issue presented is not whether plaintiffs' ability to operate an adult establishment on Telegraph Road fulfills their First Amendment rights. Rather, the appropriate inquiry is whether Erie Township's zoning ordinance satisfies constitutional requirements. Plaintiffs have mounted a facial challenge to the constitutionality of the ordinance. "A facial challenge is one that attacks the very existence or enactment of the ordinance; it alleges that the mere existence and threatened enforcement of the ordinance adversely affects all property regulated in the market as opposed to a particular parcel." *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 525; 569 NW2d 841 (1997). The overbreadth doctrine "allows a party to challenge a law written so broadly that it may inhibit the constitutionally protected speech of third parties, even though the party's own conduct may be unprotected." *In re Chmura*, 461 Mich 517, 530; 608 NW2d 31 (2000).

Indisputably, the township possesses a substantial interest in controlling the deleterious secondary effects of adult businesses. But under the intermediate-level scrutiny applied by the United States Supreme Court in *Renton*, an ordinance must "leave open *ample* alternative channels for communication of the information." *Clark v Community for Creative Non-Violence*, 468 US 288, 293; 104 S Ct 3065; 82 L Ed 2d 221 (1984) (emphasis added). Since *Renton*, the United States Supreme Court has reaffirmed this concept.

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." [*Ward v Rock Against Racism*, 491 US 781, 791; 109 S Ct 2746; 105 L Ed 2d 661 (1989) (citation omitted).][1]

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[1] In *Los Angeles v Alameda Books, Inc*, 535 US 425, 429-430; 122 S Ct 1728; 152 L Ed 2d 670 (2002) (opinion by O'Connor, J.), the United States Supreme Court reversed a ruling of the United States Court of Appeals for the Ninth Circuit that struck down a zoning ordinance that prohibited the location of more than one adult entertainment enterprise in a building. A four-

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The township's zoning ordinance must refrain from "burden[ing] substantially more speech than is necessary to further the government's legitimate interests." *Id*. at 799. In my view, an ordinance that permits only one grandfathered adult business and prohibits its relocation within the township does not leave open "ample alternative avenues of communication" in Erie Township.

Even assuming that plaintiffs sought to open a second establishment rather than merely move the first, I would hold that Erie Township's zoning scheme fails to allow "ample, accessible real estate" or a reasonable opportunity to operate an alternative channel of communication. *Renton*, *supra* at 53-54. Admittedly, Erie Township is a small, rural community. But its geographical size is similar to that of Clinton Township, which enacted the zoning ordinance approved in *Jott*, *supra* at 533-534, permitting 12 adult entertainment sites. My research reveals no caselaw supporting the notion that one adult establishment, barred from relocation, satisfies *Renton*'s requirement of "alternative avenues of communication." *Renton*, *supra* at 50. Although the First Amendment does not mandate that a community host or leave available any specific minimum number of sites for adult entertainment venues, it does require that interested parties have a "reasonable opportunity" to disseminate this form of constitutionally protected expression.

Because Erie Township's ordinance unreasonably limits to one the number of adult establishments that may operate in the township, and forecloses that single establishment from altering its location, I would hold that the ordinance violates *Renton* and would reverse.

/s/ Elizabeth L. Gleicher

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justice plurality reviewed the ordinance by applying the *Renton* framework, which imposed intermediate scrutiny of zoning ordinances aimed at controlling "the secondary effects of protected speech." *Id*. at 433-434, 438, 440-443. In a concurring opinion, Justice Kennedy agreed with the result reached by the plurality, but described as "something of a fiction" *Renton*'s "content neutral" characterization of a zoning ordinance intending to curb secondary effects arising from the operation of an adult entertainment business. *Id*. at 448 (opinion by Kennedy, J.). But Justice Kennedy later clarified that "[n]evertheless, . . . the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id*.